In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-39

ANDREW GEORGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The issues presented involve the sufficiency of the evidence, the refusal of the trial judge to give an instruction proffered by a codefendant regarding economic coercion as a defense to mail fraud, and the effect on petitioner of evidence admitted solely against his codefendants.

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on eighteen counts charging mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to imprisonment for one year and was fined $1,000 on each count.[1] The court of appeals affirmed (Pet. App. A; 477 F. 2d 508). A petition for rehearing was denied on May 31, 1973 (Pet. App. B). The petition for a writ of certiorari, filed on July 2,

[1] Codefendants Irving Greensphan and Peter K. Yonan were convicted jointly with petitioner. They have filed separate petitions for a writ of certiorari (Nos. 72-1610 [Greensphan] and 73-61 [Yonan]).

1973, is out of time under Rule 22(2) of the Rules of this Court. There is, in any event, no claim warranting further review

The pertinent evidence is set forth in the opinion of the court of appeals. It shows that codefendant Peter Yonan was hired by the Zenith Radio Corporation in 1961 as a buyer of cabinets. When, in 1966, Zenith devised plans for a new cabinet known as the "Circle of Sound," Yonan had the responsibility of finding a supplier and negotiating the price for furnishing the new cabinets. The supplier chosen was the Accurate Box Corporation, owned by co-defendant Irving Greensphan, a friend of Yonan and the only bidder on the Zenith contract. From 1966 to 1970 Accurate Box continued to be the sole bidder on this lucrative contract. Zenith believed that Accurate Box's price was reasonable; the profit margin to Accurate Box was within the 10% limit Zenith usually allowed suppliers.

Late in 1967 Yonan made certain comments to Greensphan which led the latter to believe that unless he furnished Yonan with a kickback, he might lose the Zenith business. Although both were aware of Zenith's written policy providing that suppliers were not to give gratuities to purchasing department employees, Greensphan agreed to pay Yonan kickbacks disguised as payments to A & G Woodworking Company, which was owned by petitioner, a mutual friend. Beginning in December 1967, Accurate Box received fictitious invoices for "commissions" from A & G Woodworking Company and paid out more than $300,000 in this manner, two-thirds of which petitioner kept and one-third of which he paid to Yonan.

1. In advancing his allegation of insufficiency of the evidence, petitioner argues initially that an essential element of the offense, financial loss to Zenith, was not proved. In addition, petitioner contends that there was no

evidence of his knowledge or intent to defraud. The claim relating to Zenith's financial loss has been discussed in our memorandum opposing codefendant Greensphan's petition for a writ of certiorari (No. 72-1610).[2] There we pointed to the opinion of the court of appeals, which correctly noted that the government was not required to prove that the victim of a scheme to defraud suffered an actual loss. We also argued that in any event, Zenith was in fact defrauded by Yonan's failure to bargain competitively on behalf of his employer to obtain the most favorable terms available to Zenith for the cabinet contract. As a result, Zenith's payments exceeded by more than $300,000 the price the seller in fact required. See *New England Enterprises, Inc.* v. *United States*, 400 F. 2d 58 (C.A. 1), certiorari denied, 393 U.S. 1036; *United States* v. *Rowe*, 56 F. 2d 747, 749 (C.A. 2), certiorari denied, 286 U.S. 554.

Petitioner's knowledge and intent were established by proof that he and Yonan were personal friends; that after Yonan and Greensphan had discussed kickbacks, petitioner submitted his own company's invoices to Greensphan for "commissions" on the cabinets which Greensphan had sold to Zenith; that the false invoices were based on the number of cabinets shipped by Greensphan to Zenith; that petitioner's company manifestly had done no work warranting receipt of commissions on the cabinets; that he received more than $300,000 from Greensphan in response to the frequent mailing of invoices; and that he retained two-thirds of this substantial amount and passed along more than $100,000 by check to Yonan. The question of petitioner's knowledge and intent was submitted to the jury under appropriate instructions; the jury's conclusion that petitioner was more than an "unwitting

[2] We are providing petitioner with a copy of that memorandum.

conduit" (Pet. App. 11) is supported by substantial evidence and should not be disturbed. See *United States* v. *Jones*, 425 F. 2d 1048, 1058 (C.A. 9), certiorari denied, 400 U.S. 823.

2. Petitioner's claim of error in the instructions is founded upon the refusal of the trial judge to give overlapping charges offered by codefendant Greensphan (Pet. 18) that his payments to Yonan were not made with intent to defraud Zenith, but arose from threat of economic harm (loss of the Zenith contract). As the court of appeals noted (Pet. App. 13), the instructions were properly rejected because, in the circumstances of this case, the gossamer "threat" was not a defense. See *United States* v. *Cullen*, 454 F. 2d 386 (C.A. 7); *Dranow* v. *United States*, 307 F. 2d 545, 568 (C.A. 8). Moreover, to the extent that Greensphan's defense of economic coercion was entitled to consideration by the jury, it was safeguarded by instructions given as to intent, knowledge and willfulness in the face of Greensphan's testimony that he believed the payments were necessary to keep the valuable Zenith contract.

In any event the omitted instructions had no bearing upon petitioner, who was allied with Yonan rather than Greensphan. If Greensphan were a victim rather than a perpetrator of the fraud, petitioner's culpability would be undiminished. Accordingly, even if the failure to give Greensphan's instructions could be regarded as error, petitioner was not prejudiced thereby. See *Dranow* v. *United States*, *supra*, 307 F. 2d at 569.

3. At trial, the court admitted against Greensphan and Yonan evidence that Zenith's corporate policy forbade suppliers from giving gifts or things of value to purchasing department employees; that Yonan twice signed memoranda detailing this company policy; and that Greensphan

received copies of the policy statement. The evidence was admissible to show the codefendants' knowledge and breach of duties owed to Zenith. Petitioner's claim that this evidence might have been considered against him notwithstanding instructions to the contrary because the court later gave a charge on joint venture is speculative and remote. In light of the clear evidence of petitioner's role, which was unrelated to knowledge of Zenith's corporate policy, it is evident that petitioner's conviction did not depend upon whether the jury believed that he, too, was familiar with Zenith's rules. The claim of prejudice arising from proof of the conflict of interest policy is, therefore, insubstantial.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.